IN THE

Supreme Court of the United States

OCTOBER TERM—1976

No. 76-313

PAULA GROSSMAN,

Petitioner,

vs.

BERNARDS TOWNSHIP BOARD OF EDUCATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

CONRAD N. KOCH,
Counsel for Petitioner,
Nine Clinton Street,
Newark, New Jersey 07102.

ACCARDI & KOCH,
Attorneys for Petitioner.

Adams Press Corp., 11 Commerce Street, Newark, N. J.—Market 3-8611-12

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BERNARDS TOWNSHIP BOARD OF EDUCATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States.

Your petitioner, Paula Grossman, respectfully prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Third Circuit which affirmed the Judgment of the United States District Court for the District of New Jersey which granted the Respondent's motion to dismiss Petitioner's complaint.

Citations to Opinion Below

The opinion of Judge Barlow in the United States District Court for the District of New Jersey was unreported and in attached hereto, as Appendix A, Infra.

The Judgment Order of the United States Court of Appeals for the Third Circuit is attached hereto, as Appendix B, infra.

The Judgment Order from the United States District Court for the District of New Jersey is attached hereto as Appendix C, infra.

Jurisdiction

The Judgment Order of the Court of Appeals for the Third Circuit is dated June 8, 1976. The Judgment Order from the United States District Court for the District of New Jersey is dated July 8, 1976. The opinion of the United States District Court for the District of New Jersey, was filed on October 9, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254 (1).

Questions Presented

The following questions are presented by this petition:

1. Whether all citizens of the United States of America including transsexuals have equal protection of the law?

2. Whether all citizens of the United States, including transexuals are to be given the protection of the Equal Employment Opportunity Act of 1972, 42 U.S.C. Section 2000, et seq?

3. Whether the Respondent had the right to discharge the Petitioner because of her change in sex from the male to the female gender?

4. Whether the United States District Court for the District of New Jersey erred in ruling as a matter of law that Congress did not intend to include transsexuals within the scope of the protection afforded by the Equal Opportunities Act of 1972, 42 U.S.C. Section 2000, et seq?

5. Whether the protection afforded by the Equal Employment Opportunities Act of 1972; 42 U.S.C. Section 2000 et seq, are for all males, all females and not for transsexuals?

Constitutional Provisions and Statutes Involved

The relevant portion of Title VII of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunities Act of 1972, 42 U.S.C. Section 2000 (e) et seq. are:

42 U.S.C. Section 2000 (e)-2 (a) (1) which provides:

A. It shall be an unlawful employment practice for an employer.

1. To fail or refuse to hire or to discharge any individual, or otherwise, to discriminate against any individual with respect to his compensation, terms, conditions, privileges of employment, because of such individuals' race, color, religion, sex or national origin.

Statement of Facts

Petitioner, Paula Grossman, started the above action pursuant to Title VII of the Civil Rights Act of 1964 with

particular reference to U.S.C. Section 2000 (e)-2 (a) (1).

Paula Grossman was appointed to a teaching position in Bernards Township in 1957 as Paul Grossman. In 1960 Paula Grossman, then Paul Grossman received tenure and received a permanent teacher's certificate in the name of Paul Grossman. From 1957 until 1971 Paul Grossman was employed as a teacher and taught satifactorily. The salary was $14,300. per year. While teaching, Paul Grossman instituted a number of innovative procedures. Paul Grossman was essentially a music teacher.

Paul Grossman had been affected with transsexualism. This is briefly, having the psyche of one sex in the morphological body of another sex. It is not a psychological problem and there is not one case on record where it has been cured or even helped by psychiatry. The problem first manifested itself when Grossman was five years old, it became an irritant when Grossman was a teenager, became a mild discomfort during Grossman's twenties, became a more serious problem in his thirties, became an agony in his forties, after fifty he was faced with the choice of being sexually reassigned or death. He had married in 1949 and has had three daughters. His wife and children were aware of the condition.

Paul Grossman went for treatment of his condition and found Dr. Harry Benjamin, the foremost authority on the subject. The initial treatment was with hormones until March 5, 1971, a sex reassignment operation was performed.

Paula Grossman then advised the Board of Education of Bernards of what had been accomplished. After a number of conferences from June 3, 1971 to August 9,

1971 (including Paula Grossman submitting to psychiatric examinations by experts of the Boards' own choosing) all certified that Paula Grossman was mentally competent and that there were no contradictions to her returning to the classroom.

On August 9, 1971, the Board demanded that Paula Grossman immediately resign and relinquish her tenure status in return for an oral year contract as a "new applicant teacher".

On August 19, 1971, in something called a Statement of Charges, Paula Grossman was formally dismissed as a teacher in Bernards. In the factual contentions of the Statement of Charges the following sentence appears on page 3.

> "On or about March 5, 1971, Dr. Prado performed sex reassignment survey on Grossman changing him from a male into a female."

Of the five charges on which the local Board determined that Paula Grossman should be discharged the Commissioner of Education on April 10, 1972 decided that all were invalid except, Charge III as amended by him. Essentially the reasoning was that because of her new sex, Paula Grossman's presence in the classroom had the potential for psychological harm to the students.

This decision was affirmed by the New Jersey State Board of Education and by the Appellate Division of the Superior Court of the State of New Jersey.

It is essentially Paula Grossman's position that she was discharged by the school board because of her status as a female. She takes the position that it is immaterial how she reached the status of being a female. *If Paula Grossman was not a female she would have not been*

discharged. No matter what the defendant gives as reasons for the discharge the fact remains that if Paula Grossman was not a female she would not have been discharged. The plaintiff maintains that this is discrimination under 42 U.S.C. Section 2000 (e)-2 (a) (1) which provides:

> (a) It shall be an unlawful employment practice for an employer to: (1) fail or refuse to hire or discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment, because of such individuals race, color, religion, sex or national origin.

Reasons for Granting the Writ

The ultimate question for this Court to decide would be the novel question of whether American citizens in the position of the Petitioner are to be given equal protection of the law under the Fourteenth Amendment of the United States Constitution as set forth hereinafter.

The specific question to this Court would be whether or not the Petitioner is entitled to the equal protection of the law. What must be answered is whether the Petitioner by undergoing a sex reassignment operation became a second-class citizen. It is the Petitioner's position that she is in fact a woman (and incidentally a transsexual). She is not asking to be given equal protection of the law because of her characteristics as a transsexual, but she is asking to be given equal protection because she is a woman. Petitioner did not abrogate her rights as an American Citizen by having a sex reassignment operation nor should she be reduced to the

status of a second-class citizen because of such an operation. Petitioner argues that she has been discriminated against; more than that she has been denied her constitutional rights of equal protection of the law, because she is a female.

Petitioner's arguments have been consistent and they may be summarized as follows:

1. She is a woman.

2. She was discharged because she is a woman.

3. This was an illegal discharge under Title VII of the Civil Rights Act.

4. This illegal discharge denied the Petitioner the equal protection of the law.

Insofar as authority for the above argument, Petitioner is obliged to advise the court that there are no reported decisions on this novel question. The general problem of transsexualism and the law has been treated in "Transsexualism, Sex Reassignment Surgery" in the Cornell Law Review, Vol. 56, page 963 to 1009 (1971).

CONCLUSION

It is submitted that the Petitioner finds herself in an unequal position vis a vis her constitutional rights. Petitioner merely wishes her day in Court to prove her allegations. The interpretation of this case by the United States District Court indicates that there may be a different standard for persons in the Petitioner's position. It is therefore, suggested that the Supreme Court grant certiorari in this case.

For these and for the other reasons stated, the petition for a Writ of Certiorari should be granted.

Respectfully submitted,

CONRAD N. KOCH
Counsel for Petitioner

ACCARDI & KOCH,
Attorneys for Petitioner.

APPENDIX A

Opinion of the United States District Court for the District of New Jersey

UNITED STATES DISTRICT COURT

DISTRICT OF NEW JERSEY

Civil Action No. 74-1904

PAULA GROSSMAN,

Plaintiff,

v.

BERNARDS TOWNSHIP BOARD OF EDUCATION,

Defendant.

BARLOW, *District Judge.*

Appearances:

Conrad N. Koch, Esquire
Messrs. Accardi & Koch
9 Clinton Street
Newark, New Jersey 07102
(Attorneys for Plaintiff)

Theodore Margolis, Esquire
Messrs. Young, Rose & Millspaugh
744 Broad Street (Suite 917)
Newark, New Jersey 07102
(Attorneys for Defendant)

Appendix A

This is an action instituted by the plaintiff, Paula Grossman, alleging that she has been wrongfully discharged from her position as a teacher by the defendant, Bernards Township Board of Education. Plaintiff's dismissal occurred following a sex reassignment operation performed on March 5th, 1971, by virtue of which plaintiff assumed certain sexual characteristics of the female gender. Such dismissal, it is asserted, constitutes unlawful discrimination on the basis of sex. Jurisdiction is alleged pursuant to the provisions of 29 U.S.C. §151, *et seq.*, 28 U.S.C. §1343, and 42 U.S.C. §2000e, *et seq.* The matter is before the Court at this time on the motion of the defendant to dismiss the action pursuant to Fed. R. Civ. P 8(a), 12 (b)(1), and 12(b)(6), or, in the alternative, for summary judgment. Fed. R. Civ. P. 56(c). Plaintiff has responded by filing a motion for partial summary judgment on that portion of her complaint arising under Title VII of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972, 42 U.S.C. §2000e, *et seq.*

Plaintiff was first employed, as Paul Grossman, by the Bernards Township Board of Education in 1957. During the six-year period prior to her discharge, she worked as a music teacher with elementary school students, primarily in grades four, five and six. Plaintiff was suspended by the school board on August 19th, 1971, pursuant to the provisions of N.J.S.A. 18A:6-10.[1] Certain charges against

[1] N.J.S.A. 18A:6-10 provides:

"No person shall be dismissed or reduced in compensation,

(a) if he is or shall be under tenure of office, position or employment during good behavior and efficiency in the public school system of the state, or

(Footnote continued on following page)

Appendix A

the plaintiff were thereafter certified to the Commissioner of Education, and hearings were held on December 8th, 9th, 10th, 17th, 27th and 28th, 1971. On April 10th, 1972, the Commissioner of Education sustained the plaintiff's suspension, and found that just cause was present to require her dismissal. (See Exhibit B.)[2] Of the five separate charges presented to the Commissioner for his consideration, plaintiff's suspension was affirmed, and her dismissal grounded, only upon Charge Three, which, as amended by the Commissioner, provides:

> "Paul Monroe Grossman knowingly and voluntarily underwent a sex-reassignment from male to female.

(Footnote continued from preceding page)

(b) if he is or shall be under tenure of office, position or employment during good behavior and efficiency as a supervisor, teacher or in any other teaching capacity in the Marie H. Katzenbach school for the deaf, or in any other educational institution conducted under the supervision of the commissioner:

except for inefficiency, incapacity, unbecoming conduct, or other just cause, and then only after a hearing held pursuant to this subarticle, by the commissioner, or a person appointed by him to act in his behalf, after a written charge or charges, of the cause or causes of complaint, shall have been preferred against such person, signed by the person or persons making the same, who may or may not be a member or members of a board of education, and filed and proceeded upon as in this subarticle provided.

Nothing in this section shall prevent the reduction of the number of any such persons holding such offices, positions or employments under the conditions and with the effect provided by law."

[2] All exhibits appear in the appendix to the defendant's brief, a copy of which has been filed with this opinion.

> By doing so, he underwent a fundamental and complete change in his role and identification to society, thereby rendering himself incapable to teach children in Bernards Township because of the potential her (Grossman's) presence in the classroom presents for psychological harm to the students of Bernards Township. Therefore, Paula a/k/a Paul Monroe Grossman should be dismissed from the system by reason of just cause due to incapacity."

The New Jersey State Board of Education unanimously affirmed the Commissioner's determination in favor of dismissal on February 7th, 1973. (See Exhibit C.) Thereafter, review of these administrative decisions was sought in the Appellate Division of the Superior Court of New Jersey, wherein plaintiff's dismissal was once again affirmed. *In Re Tenure Hearing of Grossman,* 127 N.J. Super. 13, 316 A.2d 39 (App. Div. 1974). Plaintiff's petition for certification was denied by the New Jersey Supreme Court on May 29th, 1974. *In Re Tenure Hearing of Grossman,* 65 N.J. 292, 321 A.2d 253 (1974). On September 24th, 1974, the Equal Employment Opportunity Commission (EEOC), responding to a charge of sex discrimination filed on August 11th, 1972 (see Exhibit E), found no reasonable cause to believe that Bernards Township had discriminated against the plaintiff on the basis of sex. (See Exhibit F.) This action followed.

Plaintiff seeks to invoke the jurisdiction of this Court under the provisions of the National Labor Relations Act, as amended by the Labor Management Relations Act of 1947, 29 U.S.C. §151, *et seq.* The precise nature of plaintiff's labor claim, whether in the form of an unfair labor practice or otherwise, is not set forth in the pleadings.

This is of no moment, however, as the Court is satisfied that the defendant is not an "employer" within the meaning of the Act, and is, accordingly, exempt from its coverage. In this regard, 29 U.S.C. §152(2) provides, in pertinent part:

> "The term 'employer' includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof . . ."

Public school boards, such as this defendant, fall within the scope of that exemption granted to states and their political subdivisions. *Police Department of Chicago* v. *Mosley,* 408 U.S. 92, 102 n. 9 (1972); *Children's Village, Inc.,* 197 NLRB No. 135, 80 LRRM 1747 (1972). As such, plaintiff's complaint could not properly state a cause of action under the National Labor Relations Act, and that part of the complaint which seeks relief thereunder must be dismissed. Fed. R. Civ. P. 12(b)(6).

Alternatively, the plaintiff alleges a cause of action arising under various provisions of the civil rights statutes, with subject matter jurisdiction vested in the district court pursuant to 28 U.S.C. §1343. In the first instance, plaintiff claims a deprivation of those rights guaranteed by 42 U.S.C. §1981:

> "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security

> of persons and property *as is enjoyed by white citizens,* and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other." (Emphasis added.)

Even a cursory examination of §1981 and related cases indicates that its purpose was to afford protection from discrimination based on race, not sex. *Rackin* v. *University of Pennsylvania,* 386 F. Supp. 992, 1008-09 (E.D. Pa. 1974); *League of Academic Women* v. *Regents of the University of California,* 343 F. Supp. 636, 638-40 (N.D. Cal. 1972). No allegation of racial discrimination appears anywhere in the plaintiff's pleadings, and, accordingly, the complaint fails to state any cause of action arising under 42 U.S.C. §1981.

Nor does the complaint state a claim within the purview of 42 U.S.C. §1983 or 42 U.S.C. §1985. Each of these statutes establishes liability only on the part of "persons" who, acting individually or in concert, may have subjected the plaintiff to a deprivation of those rights, privileges or immunities guaranteed by the United States Constitution. Plaintiff, proceeding through counsel, has named the Bernards Township Board of Education as the sole party defendant. The school board is not, however, a "person" within the meaning of 42 U.S.C. §1983 or 42 U.S.C. §1985. *Weathers* v. *West Yuma County School District R-J-I,* 387 F. Supp. 552, 555-56 (D. Colo. 1974); *King* v. *Caesar Rodney School District,* 380 F. Supp. 1112, 1114 n. 1 (D. Del. 1974); *Potts* v. *Wright,* 357 F. Supp. 215 (E.D. Pa. 1973).

Plaintiff's assertion of a claim arising under 42 U.S.C. §1988 is also without merit. This statute creates no independent substantive federal cause of action, but was

merely "intended to complement the various acts which do create federal causes of action for the violation of federal civil rights". *Moor* v. *County of Alameda,* 411 U.S. 693, 702 (1973). As such, §1988 does not enjoy the stature of an "Act of Congress providing for the protection of civil rights", and, therefore, cannot provide the district court with jurisdiction under 28 U.S.C. §1343(4). The plaintiff also having failed to state a claim under §§1981, 1983 or 1985, federal jurisdiction is not available under any of the subsections of 28 U.S.C. §1343.

As a final alternative, the plaintiff alleges that the defendant's conduct constituted an unlawful employment practice in violation of Title VII of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972, 42 U.S.C. §2000e, *et seq.* In this regard, 42 U.S.C. §2000e-2(a)(1) provides:

> "(a) It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin."

The defendant vigorously denies the allegation of sex discrimination, arguing that such could not have occurred because the plaintiff, despite the medical and surgical procedures performed, remains a member of the male gender. The Court finds it unnecessary and, indeed, has no desire, to engage in the resolution of a dispute as to the plaintiff's present sex. Rather, we assume for the pur-

pose of this action that the plaintiff is a member of the female gender. In such an instance, despite the plaintiff's conclusory allegations of sex discrimination, it is nevertheless apparent on the basis of the facts alleged by the plaintiff that she was discharged by the defendant school board *not* because of her status as a female, but rather because of her change in sex from the male to the female gender.[3] No facts are alleged to indicate, for example, that plaintiff's employment was terminated because of any stereotypical concepts about the ability of females to perform certain tasks, *Pond* v. *Braniff Airways, Inc.*, 500 F.2d 161, 166 (5th Cir. 1974), nor because of any condition common only to woman. *Wetzel* v. *Liberty Mutual Ins. Co.*, 511 F.2d 199 (3rd Cir. 1975) (pregnancy).

There is, unfortunately, a scarcity of legislative history relating to the inclusion of "sex" as a prohibited source of employment discrimination in Title VII of the Civil Rights Act of 1964. House Report No. 914, 88th Cong.,

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[3] Indeed, in filing her charge of discrimination with the EEOC on August 11th, 1972, the plaintiff specifically stated:

> "I was suspended from my tenured teaching position after fourteen years on August 19, 1971 for having had a sex-reassignment, which is an unusual, but nonetheless perfectly legitimate medical problem."

With the exception of various legal conclusions and a recitation of the procedural history of the case, the only substantive factual allegation in the body of the complaint appears in Paragraph 15, which states:

> "The plaintiff undewent a sex reassignment operation by which she became a woman. It is essentially her position that the defendant has unlawfully discriminated against her because of her sex."

2d Sess. (1964), which accompanied the Act, makes no reference to the elimination of employment discrimination based on sex, limiting its language to matters of race, color, religion, and national origin.[4] U.S. Code Cong. & Adm. News 1964, p. 2391, 2401. Indeed, it would appear that the Act was amended to include the category of "sex" in its final form without any prior legislative hearings or debate directed to that amendment. *Wetzel* v. *Liberty Mutual Ins. Co., supra,* 511 F.2d 199, 204 (3rd Cir. 1975); *Developments in the Law—Employment Discrmination and Title VII of the Civil Rights Act of 1964,* 84 Harv. L. Rev. 1109, 1167 (1971). In the absence of any legislative history indicating a congressional intent to include transsexuals within the language of Title VII, the Court is reluctant to ascribe any import to the term "sex" other than its plain meaning. Accordingly, the Court is satisfied that the facts as alleged fail to state a claim of unlawful job discrimination based on sex. While the final determination of the EEOC is in no manner binding on this Court, *Tuma* v. *American Can Co.*, 373 F. Supp. 218, 229 n. 15 (D.N.J. 1974), we note that the Commission also concluded that the defendant's conduct did not constitute discrimination on the basis of sex.

No other jurisdictional basis has been asserted by counsel for the plaintiff, and any consideration of the defendant's alternative motions or the plaintiff's partial summary judgment motion is unnecessary in light of the above determinations. Accordingly, the motions of the defendant

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[4] In passing the Equal Employment Opportunity Act of 1972, Congress gave more substantial recognition to the problem of sex discrimination in employment. See U.S. Code Cong. & Adm. News 1972, pp. 2139-40.

Appendix A

to dismiss the complaint because of its failure to state a claim upon which relief might be granted, Fed. R. Civ. P. 12(b)(6), and due to the lack of subject matter jurisdiction, Fed. R. Civ. P. 12(b)(1), are granted, without costs. An appropriate order will be submitted by counsel for the prevailing party.

GEORGE H. BARLOW
United States District Judge

APPENDIX B

Judgment of the United States Court of Appeals for the Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 75-2422

PAULA GROSSMAN,

Appellant,

vs.

BERNARDS TOWNSHIP BOARD OF EDUCATION.

(Civil No. 74-1904, D.N.J.)

Submitted Under Third Circuit Rule 12(6)
June 7, 1976

BEFORE SEITZ, *Chief Judge,* ALDISERT and GARTH, *Circuit Judges.*

JUDGMENT ORDER

After consideration of all contentions raised by appellant, it is

Appendix B

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

Costs taxed against appellant.

By the Court,

COLLINS J. SEITZ
Chief Judge

Attest:

THOMAS F. QUINN
Clerk

Dated: June 8, 1976.

APPENDIX C

Judgment of the United States District Court for the District of New Jersey

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Civil Action File No. 74-1904

PAULA GROSSMAN,

Plaintiff,

vs.

BERNARDS TOWNSHIP BOARD OF EDUCATION,

Defendant.

This matter having been opened to the United States Court of Appeals for the Third Circuit by plaintiff-appellant seeking reversal of this Court's Order of September 22, 1975; and the Court of Appeals having considered all of the contentions of the plaintiff-appellant and having issued its formal mandate on June 8, 1976 affirming the Order of this Court dated September 22, 1975 and taxing costs in favor of Appellee in the amount of $178.75;

IT IS on this 8th day of July, 1976,

ORDERED, that the Order of this Court dated September 22, 1975 be, and the same is hereby affirmed;

Appendix C

FURTHER ORDERED, that judgment for costs of $178.75 is herewith entered in favor of appellee and against appellant in accordance with the mandate of the Circuit Court of Appeals.

GEORGE H. BARLOW
U.S.D.C.J.

APPENDIX D

United States Constitution—Amendment XIV

AMENDMENT XIV

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

In The

Supreme Court of the United States

October Term, 1976

No. 76-313

PAULA GROSSMAN,

Petitioner,

vs.

BERNARDS TOWNSHIP BOARD OF EDUCATION,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

BRIEF FOR RESPONDENT IN OPPOSITION

THEODORE MARGOLIS
YOUNG, ROSE & MILLSPAUGH
Attorneys for Respondent
744 Broad Street
Suite 917
Newark, New Jersey 07102
(201) 622-7777

GORDON A. MILLSPAUGH
PETER M. BURKE
Of Counsel

(9291)
LUTZ APPELLATE PRINTERS, INC.
Law and Financial Printing
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No. 76-313

PAULA GROSSMAN,

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vs.

BERNARDS TOWNSHIP BOARD OF EDUCATION,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

Respondent, Bernards Township Board of Education, respectfully submits the following brief in opposition to the petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit affirming the judgment of dimissal entered by the district court, pursuant to Fed. R. Civ. P. 12(b)(6) and Fed. R. Civ. P. 12(b)(1).

OPINION BELOW

The judgment order of the court of appeals affirming the district court dated June 8, 1976, and the opinion of the district court in dismissing petitioner's cause of action are not reported, but both are appended to the petition for a writ of certiorari as Appendix A and Appendix B.

JURISDICTION

Respondent does not question the jurisdiction as set forth in the petition.

STATUTES INVOLVED

The relevant portion of Title VII of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunities Act of 1972, 42 U.S.C. Section 2000e, *et seq.* are 42 U.S.C. Section 2000e-2(a)(1) which provides:

> "A. Employers. It shall be an unlawful employment practice for an employer —
>
> 1. to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin."

QUESTIONS PRESENTED

Petitioner has listed five questions for consideration, none of which are properly applicable to the case *sub judice*. The Statement of the Case and the petitioner's argument indicate that the only issue which might be presented is: "Did petitioner properly invoke the jurisdiction of the federal courts pursuant to the Equal Employment Opportunity Act of 1972, 42 U.S.C. §2000e, *et seq.* in light of the peculiar factual context of the present case?" or, more succinctly: "Does Title VII of the Equal Employment Opportunity Act of 1972, U.S.C. §2000e, *et seq.* provide a cause of action for alleged discrimination resulting from a novel surgical procedure?"

STATEMENT OF THE CASE

A. The State Administrative and Appellate Proceedings

In May, 1971, Paul M. Grossman (the petitioner Paula M. Grossman, hereinafter sometimes referred to in the female gender) announced to the Superintendent of the Bernards Township School System that she had recently undergone a surgical procedure commonly referred to as "sex reassignment surgery", and had thereby allegedly been converted from the male to the female sex. Petitioner informed the Superintendent that she intended to discard her male attire and return to the classroom during the Fall Term in her new gender role.

Because of the novel problem presented to respondent School Board, the assistance of medical, legal and other experts was sought by respondent to determine the effects, if any, engendered by the return of a male teacher to lower grade classes in a new gender role. Respondent's study of the situation was carried out through the months of June and July, 1971. Respondent met with petitioner, experts suggested by petitioner, as well as petitioner's legal counsel. During the summer of 1971, the School Board was told by its consulting child psychiatrist that there would be adverse emotional and psychological consequences to the children if petitioner returned as a woman. Thereafter, respondent Board proposed to petitioner various alternatives to assure that the students would be protected from the predicted harm. Petitioner refused every alternative proposed, taking the position that only her return to the classroom would satisfy her needs. Petitioner disputed the recommendation of the School Board psychiatrist.

On August 19, 1971, petitioner was suspended[1] by the School Board on the grounds, *inter alia,* that her return would adversely affect the children, and thereafter charges were certified to the Commissioner of Education of the State of New Jersey pursuant to N.J.S.A. 18A:6-10.[2] A full hearing before the Commissioner was held on December 8, 10, 17, 18, 27 and 28, 1971. On April 10, 1972, the Commissioner, in a lengthy opinion, sustained the respondent School Board's suspension and ordered petitioner's dismissal as a teacher for reason of just cause due to incapacity. The Commissioner found that:

> "In the instant matter, however, the overreaching responsibility of the Commissioner and the local Board of Education is to the children of Bernards Township. Because of this,

1. N.J.S.A. 18A:6-14 does not empower a school board to discharge, but only to suspend a teacher.

2. N.J.S.A. 18A:6-10.Dismissal and reduction in compensation of persons under tenure in public school system.

No person shall be dismissed or reduced in compensation,

> (a) if he is or shall be under tenure of office, position or employment during good behavior and efficiency in the public school system of the state, or
>
> (b) if he is or shall be under tenure of office, position or employment during good behavior and efficiency as a supervisor, teacher or in any other teaching capacity in the Marie H. Katzenbach school for the deaf, or in any other educational institution conducted under the supervision of the commissioner:

except for inefficiency, incapacity, unbecoming conduct, or other just cause, and then only after a hearing held pursuant to this subarticle, by the commissioner, or a person appointed by him to act in his behalf, after a written charge or charges, of the cause or causes of complaint, shall have been preferred against such person, signed by the person or persons making the same, who may or may not be a member or members of a board of education, and filed and proceeded upon as in this subarticle provided.

Nothing in this section shall prevent the reduction of the number of any such persons holding such offices, positions or employments under the conditions and with the effect provided by law.

> the Commissioner relies heavily on the testimony of the child psychiatrist, who states in unequivocal terms that the children of Bernards Township would be harmed by Respondent's [Petitioner Grossman's] reappearance as a teacher."

On February 7, 1973, the State Board of Education unanimously affirmed the Commissioner's determination of dismissal. Thereafter, in a decision rendered on February 20, 1974, the Superior Court of New Jersey, Appellate Division, unanimously affirmed petitioner's dismissal, *In re Tenure Hearing of Grossman,* 127 N.J. Super. 13 (App. Div. 1974).

On May 29, 1974, the Supreme Court of New Jersey denied petitioner's request for certification. *In re Tenure Hearing of Grossman,* 65 N.J. 292 (1974).

Petitioner did not seek review by this Supreme Court of the United States.

B. The Federal Administrative and Court Proceedings

On August 11, 1972, petitioner filed a Charge of Discrimination with the Equal Employment Opportunity Commission (EEOC) charging that she was suspended from her teaching position ". . . for having had a sex-reassignment, ..." On September 24, 1974, the EEOC denied the charge of discrimination.[3]

On December 4, 1974, petitioner filed a complaint in the United States District Court of New Jersey alleging that she had undergone sex reassignment surgery and was dismissed by respondent solely because of the fact that she was a woman. Jurisdiction was alleged as being valid under provisions of the National Labor Relations Act, as amended by the Labor

3. See note 9, *infra.*

Management Relations Act of 1947, 29 U.S.C. §151, *et seq.*; 28 U.S.C. §1343, and the Equal Employment Opportunity Act of 1972, 42 U.S.C. §2000e, *et seq.* The complaint alleged violations of 42 U.S.C. §§1981, 1983, 1985, 1988 and 2000e.

Respondent moved for the dismissal of the cause of action pursuant to Fed. R. Civ. P. 12(b)(1); Fed. R. Civ. P. 12(b)(6) and, in the alternative, Fed. R. Civ. P. 56. On September 10, 1975, the district court, after initial discovery proceedings had been completed, dismissed the complaint for failure to state a claim upon which relief might be granted, and due to the lack of subject matter jurisdiction. The opinion of the district court is annexed to the petition for a writ of certiorari as Appendix A.

On June 8, 1976, the United States Court of Appeals for the Third Circuit affirmed the decision of the district court. The judgment order of the circuit court of appeals is annexed to the petition for a writ of certiorari as Appendix B.

REASONS FOR DENIAL OF THE WRIT

Petitioner's sole rationale in seeking certiorari is founded upon the erroneous contention that she was "discharged"[4] by the School Board by reason of her female gender, and, therefore, a cause of action is appropriate under Title VII of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972, 42 U.S.C. §2000e, *et seq.*

Respondent has throughout the long tenure of the present litigation and its progeny always taken issue with petitioner's claim that by virtue of surgery he has medically altered nature's course and become a female.[5] The School Board has consistently based its consideration of the suspension of petitioner on the

4. See note 1, *supra.*

5. The defendant [School Board] vigorously denies the allegation of sex discrimination, arguing that such could not have occurred because the plaintiff [petitioner], despite the medical and surgical procedures performed, remains a member of the male gender (Opinion of United States District Court, Appendix A, p. 7a).

(Cont'd)

welfare of the system's students and the potential for harm that Grossman's return to the classroom would have on those students. Petitioner's dismissal by the Commissioner of Education agreed with respondent's assessment, finding:

> "In the instant matter, however, we are not talking about fitness in the sense that the individual teacher committed an overt act against a child or school district, but rather that she, by

(Cont'd)

In response to demands for admissions served upon petitioner, the following demand and response were developed.

> "30. Admit that on September 1, 1971 plaintiff was of the male gender.
>
> Denied with the explanation that the plaintiff will always be a genetic male but is presently a socialogical [sic] female."

Respondent presented extensive expert medical evidence at the hearing before the Commissioner of Education demonstrating that a sex reassignment operation could not, in fact, accomplish a change of gender. The evidence presented by respondent's witnesses, Drs. Charles Socarides, Alan Kidwell and Harvey Hammer demonstrated that changes inflicted by surgical procedure and female hormones could only alter genitilia and some secondary sex characteristics, not genetic or reproductive physiology, and especially not deep-seated psychological gender characteristics.

Dr. Charles W. Socarides testified for respondent during the hearing before the Commissioner of Education, that:

> "Question: All right, Dr. Socarides, after surgery, is the person, this is a male transsexual, is a person a male or a female chromosomally? Answer: I'm glad you asked that, Mr. Millspaugh, and that is one of the most important items. You can do everything, you can change the body, the clothes, you've taken off the penis, you've taken out the testes, you've invaginated the scrotum, you've given endocrine preparations until they're coming out of a person's ear and you face the danger of carcinoma of the breast, you haven't changed the psychological problems, and yet if you do a buccal epithelial smear, that is you take a smear on the inside of a person's cheek and you subject it to chromosome studies, you'll find that this person is still a male. Evolution will not be bypassed it seems, and nature cannot be so easily cheated." See Transcript of Proceedings before the Commissioner of Education, December 9, 1971, at pp. 47-48.

her presence in the classroom, manifests danger to the mental health of the pupils."[6]

The Superior Court of New Jersey, Appellate Division defined the issue as follows:

> "The principal issue in this novel case is whether a male tenured teacher who underwent sex-reassignment surgery to change his external anatomy to that of a female can be dismissed from a public school system on the sole ground that his retention would result in potential emotional harm to the students."[7]

The federal district court also concurred:

> "In such an instance, despite the plaintiff's conclusory allegations of sex discrimination, it is nevertheless apparent on the basis of the facts alleged by the plaintiff that she was discharged by the defendant school board *not* because of her status as a female, but rather because of her change in sex from male to female gender."[8]

Petitioner's prior position is also in direct conflict with the claim of sex discrimination presented to the district court. In her

6. *In the Matter of the Tenure Hearing of Paula M. Grossman*, Decision of Commissioner of Education, page 35.

7. *In re Tenure Hearing of Grossman*, 127 N.J. Super. 13, 19 (App. Div. 1974).

8. Opinion of United States District Court, Petition for Writ of Certiorari, Appendix A, p. 7a.

In an affidavit dated May 24, 1975 and filed with the district court in the instant litigation, petitioner states, in part:

> "I was 'formally discharged' simply because I had an operation which according to Paul F. Mallon, President of the School Board for the Township of Bernards in a Statement of Charges, dated August 19, 1971 changed me from a male into a female."

filing of a charge of discrimination with the EEOC, petitioner stated:

> "I was suspended from my tenured position after fourteen years on August 19, 1971 for having had a sex-reassignment, which is an unusual, but nonetheless perfectly legitimate medical problem."[9]

Petitioner's allegation that she was the victim of discrimination because of her female gender is, therefore, simply contrary to the voluminous record that has preceded this petition. Petitioner's suspension by respondent Board was effected by virtue of the Board's judgment, after extensive professional consultation, that Grossman's return to the classroom would present a danger of psychological and emotional harm to the children. There is not a scintilla of evidence that could lead to the allegation that petitioner was suspended because she is a woman. On the contrary, the record is clear that respondent never accepted the concept that petitioner had, in fact, been converted to the female gender. It is, therefore, difficult to believe that petitioner's allegation of discrimination predicated upon "her female gender" is factually attributable to this respondent School Board.

Stripped of the incorrect and refuted contention of discrimination based upon sex, the only question that remains is

9. Charge of Discrimination filed by petitioner on August 11, 1972. The EEOC's decision on September 24, 1974 concluded that:

> "Although the operation in question was a sex reassignment, we find nothing in the legislative history of Title VII to indicate that such claims were intended to be covered by Title VII. Absent evidence of a Congressional intent to the contrary, we interpret the phrase 'discrimination because of sex,' in accordance with its plain meaning, to connote discrimination because of gender. We, therefore, are compelled to conclude that Charging Party's [Petitioner] termination, based in part upon having undergone a sex reassignment operation, does not constitute discrimination because of sex. [Footnotes omitted.]

whether Title VII of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972, 42 U.S.C. §2000e, *et seq.* intended to provide a cause of action for alleged discrimination predicated upon a novel surgical procedure and the effects caused by that procedure. A plethora of federal court decisions clearly deny such a basis as being actionable under 42 U.S.C. §2000e, *et seq. Griggs v. Duke Power Co.*, 401 U.S. 424, 429 (1971); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); *Willingham v. Macon Telegraph Pub. Co.*, 507 F.2d 1084, 1091 (5th Cir. 1975).

The legislative history of Title VII of the Civil Rights Act of 1964 contains no legislative history which would indicate any intent by Congress to include medical procedures or transsexuals within the language of Title VII. House Report No. 914, 88th Cong., 2d Sess. (1964); U.S. Code Cong. & Adm. News 1964, p. 2391, 2401. See also *Frontiero v. Richardson*, 411 U.S. 677, 686 (1972). It is clear that Congress, in fact, included the category of "sex" by amendment, as an afterthought provision, without either debate or prior legislative hearings.[10] *Wetzel v. Liberty Mutual Ins. Co.*, 511 F.2d 199, 204 (3d Cir. 1975).

Petitioner piles one invalid assertion upon another and produces thereby a mystical violation of the Fourteenth Amendment, claiming that she has been denied equal protection of the laws. Petitioner does not, however, define the basis of such an untenable claim, nor has petitioner advised the court that the same vague contention has already been twice rejected in other forums.[11]

10. Several bills seeking to amend the Civil Rights Act of 1964 were introduced in the House of Representatives. See, *e.g.*, H.R. 10,389, 94th Cong., 1st Sess. (1975); and H.R. 5452, 94th Cong., 1st Sess. (1975). These bills deal with affording coverage to those who are being discriminated against for their "sexual or affectional preference." Not even those proposed amendments would cover the illusory allegations of petitioner's complaint. See 121 Cong. Rec. E 1441, E 1442 (daily ed. March 25, 1975) (remarks of Cong. Abzug re H.R. 5452). See also footnote 3, *supra*. H.R. 10,389 and H.R. 5452 are presently pending in the House Subcommittee on Civil and Constitutional Rights.

11. The Superior Court of New Jersey, Appellate Division, found:

(Cont'd)

The action by respondent in suspending a teacher on the ground that the teacher would pose a potential for danger or harm to students is neither a unique procedure or invidious classification. *Morrison v. State Board of Education*, 82 Cal. Rptr. 175, 461 P.2d 375 (Sup. Ct. 1969); *Board of Trustees of Compton Jr. Col. Dist. v. Stubblefield*, 16 Cal. App. 3d 820, 94 Cal. Rptr. 318, 321 (Ct. App. 1971).

Petitioner misreads the prior decisions of the district court and court of appeals as finding that transsexuals are somehow second-class citizens (Petition for Writ of Certiorari, p. 6). Nothing contained in the litigation to date has even ventured into the broad general question of a transsexual's legal status. On the contrary, the causes of action relating to petitioner's suspension have dealt with the very narrow issue of the specific effects of this petitioner's return to the respondent school system's classrooms, and the validity of respondent's decision to suspend Grossman because of the potential harm to students.

It is clear, after reviewing the petition for a writ of certiorari, that petitioner is simply seeking another forum in which to relitigate, rather than presenting an important or controverted legal issue which is either in controversy in the

(Cont'd)

> "We perceive no merit in the argument that Mrs. Grossman's 'constitutional rights to equal protection of the laws have been violated by the application of standards resulting in her dismissal where the same standards are not applied to other teachers in the same school system.' It has not been demonstrated that the standard of unfitness based upon a teacher's adverse emotional effect upon students would not be applied to other teachers if the facts warranted such result." *In re Tenure Hearing of Grossman*, 127 N.J. Super. 13, 33-34 (App. Div. 1974).

The U.S. District Court found:

> "No facts are alleged to indicate, for example, that plaintiff's employment was terminated because of any stereotypical concepts about the ability of females to perform certain tasks, *Pond v. Braniff Airways, Inc.*, 500 F.2d 161, 166 (5th Cir. 1974), nor because of any condition common only to woman. *Wetzel v. Liberty Mutual Ins. Co.*, 511 F.2d 199 (3d Cir. 1975) (pregnancy)."

courts or is of sufficient importance to warrant review by this Court. The novel issues of this case are factual, not legal. The facts, as well as the law, have already been litigated and reviewed a half dozen times before, and each time the appropriate authorities have validified and supported the respondent's conduct. More importantly, it is clear that Title VII did not enfranchise a cause of action for alleged discrimination resulting from unique medical procedures.

The petition for a writ of certiorari fails to present any legal question sufficient to meet the standards of this Court (Sup. Ct. R. 19).

CONCLUSION

For the reasons stated above, respondent says that a petition for a writ of certiorari should be denied.

Respectfully submitted,

s/ Theodore Margolis

YOUNG, ROSE &
MILLSPAUGH
Attorneys for Respondent